

138 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

PJM Interconnection, L.L.C.

Docket No. ER11-3322-001

ORDER CONDITIONALLY ACCEPTING COMPLIANCE FILING

(Issued February 24, 2012)

1. On January 5, 2012, PJM Interconnection, L.L.C. (PJM) submitted tariff revisions¹ in compliance with a Commission order issued November 4, 2011 addressing performance of demand response capacity resources (Capacity DR).² For the reasons discussed below, we accept PJM's compliance filing, subject to conditions. PJM must make another compliance filing within 15 days of the date of this order should it determine to proceed with the tariff provisions accepted, subject to conditions, in this proceeding.

I. Background

2. On April 7, 2011, PJM submitted a filing, proposing to clarify, in its tariff, the manner in which the performance of Capacity DR should be measured during emergency dispatch and performance verification testing.³ PJM explained that, under its then-

¹ The tariffs to which these revisions apply are PJM's Open Access Transmission Tariff (OATT), the Amended and Restated Operating Agreement (Operating Agreement) and the Reliability Assurance Agreement Among Load Serving Entities in the PJM Region (Reliability Assurance Agreement).

² *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,108 (2011) (November 2011 Order).

³ A demand resource is designed to provide a demand reduction, or load control capability, that is cleared in a capacity auction, or which is otherwise committed through a load serving entities' long-term capacity plan. See PJM Reliability Assurance Agreement at section 1.13.

existing tariff, certain customers - specifically, those customers registered as capacity resources in the PJM Emergency Load Response Program⁴ and using the PJM's Guaranteed Load Drop (GLD)⁵ measurement and verification option in the delivery year - could show substantial over compliance for capacity commitments by applying towards that commitment load reductions that were used by those customers to manage their peak load contribution PLC,⁶ that is peak shave. PJM expressed its concern that Curtailment Service Providers (CSPs)⁷ were compiling customer portfolios that allowed for the over-performing customers to offset the under-performing customers in the delivery year, even if the over-performing customers' load reduction exceeded those customers' capacity auction nomination limit (that is, the PLC) because under PJM's tariff, compliance in the delivery year for GLD participants was determined by comparing actual load dropped during the event to the nominated amount of load drop.

3. Accordingly, PJM proposed clarifications to its market rules to ensure accurate measurement of the capacity that Capacity DR resources actually provide when they are dispatched or tested. Specifically, PJM proposed that, for a load reduction to be recognized as having satisfied its capacity commitment, GLD Capacity DR load reductions in the delivery year must be referenced to a baseline that is the lesser of a customer's PLC, or comparison load.⁸ PJM stated that a PLC-based performance

⁴ PJM OATT, Attachment K-Appendix, PJM Emergency Load Response Program.

⁵ GLD is "[l]oad management achieved by a customer reducing its load by a pre-determined amount . . . upon notification from the Provider's market operations center or its agent." *Id.* at Attachment DD-1 at section H.

⁶ As defined in the November 2011 Order, the PLC is the average of the customer's actual load during the five coincident peak hours of the preceding delivery year. PJM uses the RTO peak load forecast and the unforced reserve margin to establish the PJM region's reliability requirement for the capacity auctions. The RTO peak load forecast is based on load during the coincident peak day, which is also one of the five days that serve as the foundation for customer PLCs. The PLC also acts as a limit to the amount of Capacity DR that is added back to unrestricted peak load that is used in the RTO peak load forecast.

⁷ See PJM OATT, Attachment K-Appendix at section 1.3.1A.001 (defining a CSP as a "Member or a Special Member [who, acting] on behalf of itself or one or more other Members or non-Members, participates in the PJM Interchange Energy Market by causing a reduction in demand.").

⁸ PJM Manual 19, Attachment A (Load Drop Estimate Guidelines) at 24.

measurement methodology was necessary to ensure that consumers in the PJM region will pay only for capacity reductions that are actually delivered to PJM and that the amounts of capacity PJM procures, through its capacity auctions, would continue to be adequate to maintain system reliability.

4. In an order issued June 3, 2011, the Commission accepted and suspended PJM's filing for a five month period to become effective November 7, 2011, subject to refund, and the outcome of a technical conference.⁹ In the November 2011 Order that followed the technical conference, the Commission accepted PJM's filing, effective November 7, 2011, subject to conditions. No party sought rehearing of the November 2011 Order.

5. While the Commission found that PJM's proposed reliance on PLC as a Capacity DR performance measurement standard was consistent with the purpose of capacity procurement in the PJM region (that is, the procurement of capacity resources to meet forecasted system demand during peak periods), the Commission found that the proposal is not just and reasonable unless PJM incorporates an interim mechanism that accounts for commitments previously made by CSPs for 2012-13, 2013-14 and 2014-15 delivery years.¹⁰

6. The Commission also noted that PJM's tariff revisions seemingly alter current customer aggregation mechanisms by changing the dynamics of individual customer load reductions.¹¹ The Commission found that, because PJM had not fully explained how the beneficial effects of aggregation would be achieved under its rule changes, PJM's filing would be accepted subject to the condition that PJM address how aggregation will be implemented and how penalties will be assessed for the under-compliance of aggregated customers.¹²

7. The Commission also noted that for a comparison load assessment, PJM had failed to define how it, or a CSP, would qualify the "best" representation of what load would have been, had the resource not been instructed to reduce consumption.¹³ Accordingly, the Commission accepted PJM's filing on the condition that it submit revised tariff

⁹ *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,212 (2011). The technical conference was convened by Commission Staff on July 29, 2011.

¹⁰ November 2011 Order, 137 FERC ¶ 61,108 at P 81.

¹¹ *Id.* P 69.

¹² *Id.*

¹³ November 2011 Order, 137 FERC ¶ 61,108 at P 79.

language, in its compliance filing, listing the options available for estimating comparison loads and providing a reference to the manual in which these options are described.¹⁴

8. The Commission also noted that, under PJM's rule changes, a Capacity DR resource would only be compensated in the capacity market up to its PLC, but found that PJM's proposed tariff language was unclear on the mechanism by which Capacity DR resources will receive payments in the energy market for the full load reduction, even if that reduction is above the PLC.¹⁵ Accordingly, the Commission accepted PJM's filing on condition that PJM submit revised tariff language, in its compliance filing, clarifying how Capacity DR resources will receive energy market payments for reductions above the PLC.¹⁶

9. In addition to the GLD measurement option, the Commission also noted that, under PJM's tariff, customers are permitted to elect a measurement and verification option known as the firm service level (FSL) methodology.¹⁷ The Commission further noted that while under PJM's rule changes, compliance for FSL customers had been clarified, PJM had failed to include these clarifications at Attachment DD-1 of the PJM OATT and Schedule 6 of the Reliability Assurance Agreement. Accordingly, the Commission accepted PJM's filing on the condition that it include these conforming changes in its compliance filing.¹⁸

II. PJM's Compliance Filing

10. PJM states that its compliance filing responds to each of the five compliance directives summarized above. PJM requests that its compliance filing revisions be made effective November 7, 2011, the effective date established by the November 2011 Order. PJM also requests that its compliance filing be addressed by the Commission in an order issued no later than February 15, 2012. In support of its proposed issuance date, PJM states that this time frame would assist implementation of its interim transition

¹⁴ *Id.*

¹⁵ *Id.* P 78.

¹⁶ *Id.*

¹⁷ See PJM OATT, Attachment DD-1 at section H (defining FSL as "[l]oad management achieved by a customer reducing its load to a pre-determined level . . . upon notification from the Provider's market operations center or its agent.").

¹⁸ November 2011 Order, 137 FERC ¶ 61,108 at P 80.

mechanism for the upcoming third incremental auction, which starts on February 27, 2012 for the 2012-13 delivery year.¹⁹

III. Notice of Filing and Responsive Pleadings

11. Notice of PJM's filing was published in the *Federal Register*, 77 Fed. Reg. 2286 (2012), with interventions and protests due on or before January 17, 2012. Timely-filed protests and/or comments were submitted by Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor of PJM (IMM); Energy Curtailment Specialists, Inc. (ECS); PJM Industrial Customer Coalition (PJM-ICC); Viridity Energy, Inc. (Viridity); EnerNOC, Inc. (EnerNOC); Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation); and Comverge, Inc. (Comverge).

12. Motions to intervene out-of-time were submitted by Constar, Inc. (Constar), on February 2, 2012, and by Stavola Companies (Stavola) and Congoleum Corporation (Congoleum), on February 3, 2012. Constar, Stavola, and Congoleum also submitted protests.

13. Answers were submitted, on January 25, 2012, by the PJM Power Providers Group (P3), on January 27, by the IMM, on January 30, by Viridity and PJM, and on February 3, 2012, by EnerNOC.

IV. Procedural Matters

14. Given their interests, the early stage of this compliance proceeding and the absence of undue prejudice or delay, we grant the unopposed late-filed interventions submitted by Constar, Stavola, and Congoleum. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers to protests and answers to answers submitted by P3, the IMM, Viridity, PJM, and EnerNOC because they have provided information that assisted us in our decision making process.

V. Discussion

15. As discussed below, we accept PJM's proposed interim mitigation mechanism and proposed descriptions for available comparison load baselines, subject to conditions, to become effective, as requested, on November 7, 2011. We also accept PJM's compliance filing with respect to aggregation, updates to the compliance requirements for the firm service level option, and clarifications for energy market payments for capacity demand

¹⁹ The 2012-13 delivery year commences on June 1, 2012.

resources, to become effective, as requested, on November 7, 2011. The issues relating to the interim mitigation mechanism, aggregation, and comparison load updates were protested and are addressed in detail below.

A. Interim Mitigation Measures

1. November 2011 Order

16. The Commission accepted PJM's filing on the condition that PJM incorporate an interim mechanism to account for commitments previously made by CSPs.²⁰

2. PJM's Compliance Proposal

17. PJM states that its proposed interim mechanism primarily relies on the incremental capacity auctions to provide economic protection for CSPs by allowing CSPs to buy out of their previous capacity commitments. PJM states that any CSP that believes any or all of its previously cleared commitment is not "viable" under the new PLC-based measurement methodology must inform PJM in writing by no later than 30 days prior to the next incremental capacity auction. This would, in turn, allow the CSP to utilize the remaining incremental auctions to eliminate its commitment of such capacity. In the event that the CSP must pay more in the incremental auction for replacement of the capacity than the price at which its Capacity DR cleared in the base residual auction, PJM will provide the CSP with a "DR Capacity Transition Credit" to cover the CSP's losses. PJM explains that its proposed DR Capacity Transition Credit is equal to the clearing price in the incremental auction minus the clearing price in the base residual auction, multiplied by the megawatts (MW) of capacity previously cleared. In the event where the incremental auction price is less than the base residual auction price for the same delivery year, PJM will not provide the DR Capacity Transition Credit. PJM argues that in such a situation, the CSP will receive the difference between the two prices or a "monetary gain," and therefore the CSP will have no losses associated with the procurement of replacement capacity in the incremental auction.

18. PJM notes that some CSPs have already taken advantage of the opportunity to seek replacement capacity in the incremental auctions and have reduced, or even eliminated, their DR capacity commitment for the relevant delivery years.

²⁰ November 2011 Order, 137 FERC ¶ 61,108 at P 81. The Commission noted that other parties submitted alternative proposals for interim measures that PJM may wish to consider. The Commission cited, as an example, PJM-ICC's alternative proposal, as described in Robert A. Weishaar, Jr.'s July 29, 2011 comments on behalf of the PJM-ICC at 4.

19. PJM also proposes to provide CSPs with an “Alternative DR Transition Credit” *in lieu* of the DR Capacity Transition Credit, to the extent the CSP can demonstrate that it has unavoidable contractual obligations that cannot be mitigated by incremental auction replacement capacity.²¹ PJM states that to qualify for this make-whole payment, any such unavoidable obligation must have been entered into prior to April 7, 2011 (the date on which PJM made its filing in the present docket).²² PJM states that a CSP that pursues such a claim based on unavoidable contractual obligations may also elect to reduce or eliminate its base residual auction commitment through incremental auctions.

20. In its filing and its proposed tariff provisions, PJM outlines specific conditions under which CSPs would be eligible to receive make-whole payments from the DR Capacity Transition Credit and the Alternative DR Transition Credit. First, PJM states that its tariff provisions should apply only to the extent (if any) that the CSPs in question have not used other means of preventing any losses on their pre-existing base residual auction commitments that the change in PJM’s market rules might engender for them. PJM also notes that CSPs will not be eligible for its proposed interim mechanism if the CSPs contract with an end-use customer includes a “regulatory out” provision.

21. PJM states that the pay-outs it will be required to make to CSPs for DR Capacity Transition Credits and Alternative DR Transition Credits will be collected by PJM during the applicable delivery year from load in the Locational Deliverability Area for which the CSP originally cleared its capacity bid.

²¹ The proposed tariff revisions state that the CSP may seek compensation through the Alternative DR Transition Credit *in lieu* of any DR Capacity Transition Credit, under the following conditions: (a) the CSP provides 30 days notice to PJM before the incremental auction that it believes its previous commitment is not viable; and (b) the CSP verifies within 60 days of the start of the delivery year that it entered into contractual arrangements before April 7, 2011 that require the CSP to pay end-use customers in an amount that exceeds: (i) the base residual auction clearing price; and (ii) monetary gains (equal to the difference between payments received from committing demand resources in the base residual auction and payments that must be made by the CSP for the purchase of replacement capacity in the incremental auctions). *See* proposed PJM OATT, Attachment DD at section 5.14A(C).

²² PJM asserts that it would not have been reasonable for a CSP to incur obligations after this date, based on the assumption that PJM’s prior rules would be kept in place, without revision.

3. Protests and Comments

22. EnerNOC, Comverge, PJM-ICC, and ECS argue that PJM's proposal fails to satisfy the requirements of the November 11 Order in that it is insufficient to protect the CSPs' reasonable reliance expectations. EnerNOC and Comverge claim that PJM's proposed DR Capacity Transition Credit will only be provided when losses are directly attributable to, and limited by, the price differential between the base residual auction and PJM's incremental auctions. They add that since typically the incremental auction price is lower than the base residual auction price, PJM's proposal will not provide sufficient compensation to cover a CSP's contractual obligations. In addition, EnerNOC argues that PJM's proposed Alternative DR Transition Credit is ineffectual because it has been designed in a way that it will apply to no one. EnerNOC and Comverge assert that the specific unavoidable contractual obligation must be for an aggregate amount that is more than the applicable clearing price in the base residual auction, plus any monetary gains that the CSP obtains from unwinding all other capacity commitments, including other incremental auction transactions not related to the PJM proposed interim mechanism. Therefore, they argue that the CSPs will not be eligible for the Alternative DR Transition Credit.

23. Comverge notes that, under the DR Capacity Transition Credit, a CSP may be motivated to buy back the short position at a price that is materially higher than the price that cleared in the base residual auction. Comverge asserts that the CSP would bear no financial risk relative to the high purchase price. Comverge states that, similarly, a generator could offer its capacity at an excessive price with no risk, potentially subjecting load to an excessive uplift charge. Comverge also argues that PJM's proposal fails to address the CSP's reasonable reliance expectations attributable to the CSP's hedging activities. Comverge explains that, in the base residual auction, CSPs "sell" a capacity commitment and then, after that obligation has been secured, hedge that short position with a long position through a customer that will provide load reduction to the market during an event.

24. EnerNOC similarly argues that PJM's untested unwinding concept may have unintended consequences that could be disruptive to the equilibrium of the PJM auction process. EnerNOC asserts that, at a minimum, PJM's proposal would introduce a market intervention unanticipated by market participants as of the time that the relevant base residual auctions were conducted.

25. Comverge asserts that PJM's proposal is unworkable as it relates to the immediately-pending delivery year and the scheduled start of the February 27, 2012 incremental auction. Comverge notes that PJM asks the Commission to act on its compliance proposal by February 15, 2012, and further proposes to require CSPs seeking to participate in the incremental auction, for transition relief purposes, to provide written notice of its intent no later than 30 days prior to the incremental auction. Comverge

argues that it does not make sense for PJM to impose a requirement on the market that includes a deadline that will have already passed on the date that the Commission issues its requested order.

26. Comverge also argues that PJM should not be in the business of reviewing a CSP's contractual relationships, which could involve difficult contract interpretation issues and require judgment regarding the parties' intent. Comverge further argues that the contracts at issue could number in the thousands. Constellation also urges the Commission to reject PJM's proposed review of third-party contracts, stating that issues arising under these contracts should be settled by the contracting parties themselves, without shifting costs to third-party consumers.

27. ECS notes that PJM's compliance filing requires the CSP to incorporate the market features now available to CSPs to mitigate risks attributable to the CSP's prior capacity commitments. ECS argues that requiring such mitigation as a precondition for eligibility for a transition mechanism is not required by the November 2011 Order.

28. Constellation argues that PJM's proposed reliance on incremental auctions as a transition mitigation measure could give rise to abuse, if not revised. Specifically, Constellation argues that, under PJM's proposal, a CSP will have the incentive to bid below the base residual auction price in the first two incremental auctions, but have no incentive to limit its bid in the third incremental auction, if it is entitled to receive a make-whole payment. Constellation argues that such an approach has the potential to create unnecessary and extraneous costs that should not be shifted to consumers.

29. Constellation also argues that PJM's proposed use of the term "unviable capacity," in describing the rights of a CSP to participate in PJM's incremental auction, for transition mitigation purposes, should be clarified. Specifically, Constellation proposes that the term, unviable capacity, be read to apply to sites that have been committed by a qualified CSP for the volume of commitment that does not qualify as capacity due to its measurement from a comparison load level in excess of PLC. Constellation argues that unviable capacity should also expressly exclude any capacity commitments from sites that were committed at, or below, PLC, but for which the CSP had not expected the site to perform up to the level of the commitment (instead relying on other capacity in the CSP's portfolio to fill the gap).

30. The IMM argues that PJM's proposed review of third-party contracts, for the purpose of identifying obligations purported to be unavoidable, is unnecessary, given that CSPs will be given ample opportunity, under PJM's proposal, to unwind their positions in PJM's incremental auctions. The IMM argues, in the alternative, that if PJM's contract review provision is accepted, compensation should be made subject to the determination that: (i) all reasonable efforts were made by the CSP to unwind its

positions and that losses were minimized; and (ii) the transactions at issue were not undertaken for the purpose of manipulating the PJM capacity market.

31. EnerNOC asserts that, in commercial law, the term “expectation interest” reflects the benefit of the bargain, or what a non-breaching party expected to receive under a contract.²³ EnerNOC adds that the Commission utilized a comparable standard in its open access transmission rule, in addressing the right of a utility to seek stranded cost recovery.²⁴ Specifically, EnerNOC argues that, under Order No. 888, a utility that had a reasonable expectation of continuing to serve a customer, prior to the advent of open access, was permitted to recover, as a stranded cost, its anticipated lost profit.²⁵ EnerNOC argues that its reasonable reliance expectations in this case include sunk costs in workforce investment, business planning, marketing, contracting, hardware and installation expenses. EnerNOC asserts that these costs cannot be fully recovered by simply allowing EnerNOC to unwind its capacity obligations. EnerNOC also challenges PJM’s proposal that reasonable reliance expectations be deemed to have terminated as of the date of PJM’s filing, that is, on April 7, 2011. EnerNOC argues that it is

²³ EnerNOC Protest at 21 (citing E. Allen Farnsworth, Contracts § 12.1 (4th ed. 2004)). EnerNOC notes that “reliance interest,” by contrast, affords a lower level of protection reflecting a non-breaching party’s detrimental change in position induced by reliance on a contract. EnerNOC adds, however, that even a reliance interest standard would allow a party forced to abandon a commercial opportunity to recover all investments, development expenses and other costs incurred by that party to put itself in a position to perform its contractual obligations. EnerNOC further argues that the losses a party would be eligible to recover, as a reliance interest, include the expenses it incurred, or the preparations it made, for collateral transactions it planned to carry out once the contracts at issue were performed, and/or the cost of foregoing other profitable opportunities.

²⁴ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in part and rev’d in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

²⁵ EnerNOC Protest at 22 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at P 699).

unreasonable to assume that customers are not entitled to rely on existing tariffs, as of the day a utility makes a filing proposing a tariff change.

32. Several alternative interim mechanisms are proposed by intervenors. Comverge proposes that, for the 2012-13 delivery year, PJM be required to use the market rules that were in effect prior to April 7, 2011. Comverge further proposes that, for the 2013-14 delivery year, load drop be calculated across a CSP's zonal aggregations and that the sum of the load drops within a zone be no greater than the sum of the customers' PLC in that zone. Finally, Comverge proposes that, for the 2014-15 delivery year, load drop be calculated based on a multiple of PLC, as may be agreed to PJM's stakeholders.

33. PJM-ICC proposes that from the effective date of PJM's filing through the delivery years prior to 2015-16 delivery year, DR resources be permitted to use the comparison load measurement options previously in effect, provided that a customer's GLD curtailment not exceed the customer's PLC.²⁶

34. ECS proposes that PJM's prior rules be grandfathered through the end of the three-year transition period, given the numerous risks that CSPs will be required to shoulder.

35. EnerNOC proposes that the Commission reject PJM's proposed interim mechanism and order PJM to submit a revised proposal after further consultation with the affected parties. EnerNOC proposes that PJM's current market rules and settlement practices be left in place until a revised proposal is approved by the Commission.²⁷ Alternatively, EnerNOC proposes that PJM utilize, as an interim mechanism, the settlement practices in effect prior to 2009. EnerNOC states that this alternative transition mechanism could be adopted by the Commission and made effective for the 2012-13 delivery year, or, instead, the Commission could leave current settlements unchanged for the 2012-13 delivery year and order implementation of this alternative only for the post-2012-13 transition years.

²⁶ PJM-ICC notes that it would open to alternative measures that would: (i) protect reasonable reliance expectations of suppliers; (ii) not exacerbate reliability concerns; and (iii) not result in cost-shifting.

²⁷ See also Stavola Protest at 4; Constar Protest at 5; Congoleum Protest at 6. EnerNOC notes that such an approach would be consistent with the Commission's treatment of grandfathered transmission service agreements, under Order No. 888.

4. PJM's Answer

36. PJM argues that its proposed transition mechanism appropriately protects CSP's reasonable reliance expectations. PJM argues that the Commission's directives, in this regard, apply only to CSPs' existing commitments, not to future unexecuted commitments. With respect to existing commitments, PJM asserts that its incremental auctions provide a reasonable mechanism for CSPs to buy out of their previously cleared positions.

37. PJM argues that neither EnerNOC nor any other party has demonstrated that they entered into any contracts after April 7, 2011 in reliance on the previously effective capacity performance rules. PJM adds that, regardless, any such contract would have been executed with the understanding that the practice of relying on load reductions, in excess of PLC, for DR capacity performance, was subject to imminent change. PJM argues that, as such, those commitments would have been made subject to those parties' own risk.²⁸

38. PJM characterizes intervenors' alternative proposed transition mechanism as improper collateral attacks of the November 2011 Order. PJM argues that, even assuming these proposals should be considered on the merits, continuing to allow prior performance would denigrate PJM's system reserve margin during times of peak demand. PJM asserts that should this occur, it would be compelled to procure additional capacity in its capacity auctions, thereby imposing higher costs on consumers.

39. PJM also responds to Constellation's request that PJM define "unviable" base residual auction commitments and make all claims of unviable commitments subject to audit and certification procedures. PJM asserts that neither PJM nor the IMM is in the position to judge the extent to which a CSP can assemble, or has assembled, a portfolio of DR resources that will allow it to satisfy its base residual auction commitments.

5. Commission Determination

40. We accept PJM's proposed interim mitigation mechanism, subject to certain conditions.

41. The November 2011 Order found that PJM's proposed PLC baseline metric was not just and reasonable "unless PJM incorporates an interim mechanism that accounts for

²⁸ See *id.* at 5, n. 9 (citing *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,031, at P 38 (2005) (an FPA section 205 filing to amend a tariff provisions is sufficient to end any reasonable reliance on the then-effective terms of service)).

commitments previously made by CSPs.”²⁹ The order explained that “because PJM utilizes an auction three years in advance, CSPs may have made some commitments based on an assumption that they could count reductions from actual load levels above the PLC as part of their performance.”³⁰ PJM’s original proposal relied on an approach that multiplied a customer’s PLC by 1.25 as a method to account for such reliance.³¹ The November 2011 order found that “[n]ot only does the 1.25 proposal expire earlier than the prior capacity commitments, PJM has not shown that it will fully protect CSPs that have made such commitments, as some CSPs may have projected curtailment capabilities for certain customers in an amount greater than 1.25 times the PLC.”³² The Commission therefore accepted “PJM’s filing, conditioned on PJM submitting an interim mitigation measure that applies more broadly from the 2012-13 delivery year through the 2014-15 delivery year, which is coincident with the last delivery year for which a base residual capacity auction has been held.”³³ The Commission order also pointed out that the other mitigation measures that were proposed in the proceeding, including at the technical conference, provided broader protection of CSPs’ reliance interests by adjusting the performance metric applied during the interim period.

42. In its proposal here, PJM departs from its prior proposed interim mechanism that adjusted the baseline of the PLC-based performance measurement methodology during the interim period, and instead relies on buy-back provisions in incremental auctions and credits to provide opportunities for CSPs to replace capacity previously committed. There are two make-whole credits that PJM has proposed. The first, the DR Capacity Transition Credit, provides compensation to the CSP in the event that the CSP procures replacement capacity in the incremental auctions at a higher cost than the price received for that capacity in the base residual auction. The second credit, the Alternative DR Transition Credit, is intended to permit the CSPs to recover costs from unavoidable contractual obligations that were made before PJM presented its currently-effective PLC-based performance measurement methodology. PJM claims this proposal will protect CSPs’ reasonable reliance interests by insulating them from any economic losses

²⁹ November 2011 Order, 137 FERC ¶ 61,108 at P 81.

³⁰ *Id.*

³¹ In its April 7, 2011 filing, PJM proposed an interim mechanism that measured customers’ load reductions for the 2011-12 delivery year relative to the customers’ PLC multiplied by a factor of 1.25.

³² November 2011 Order, 137 FERC ¶ 61,108 at P 81.

³³ *Id.*

they may incur due to implementation of the PLC-based performance measurement methodology.

43. Contrary to intervenors' assertions, we find that PJM's proposed interim mechanism is not too limited in its reach. The November 2011 Order provided PJM with the flexibility to propose an interim mechanism that was discussed at the July 29, 2011 technical conference or a different approach, so long as the interim mechanism protects the reasonable reliance expectations of DR suppliers through the 2014-15 delivery year. We find that PJM's proposal generally meets the criteria established in the November 2011 Order and accept PJM's filing, subject to PJM revising its proposed interim mechanism within 15 days of the date of this order to ensure sufficient protection for CSPs for unavoidable losses they incur on contract commitments made prior to April 7, 2011.

44. We find that PJM's proposed reliance on the incremental auctions is a just and reasonable means for CSPs to buy out of their previous capacity commitments in the event that those commitments are no longer viable due to the implementation of the PLC-based performance measurement methodology. In this respect, PJM's proposal accounts for commitments previously made by CSPs, as directed in the November 2011 Order. In addition, if the CSP procures the capacity in the incremental auction at a lower price than the base residual auction price, then PJM's proposal allows the CSP to keep the difference in prices as a monetary gain. In the event that the CSP has to pay a higher price in the incremental auction for capacity, relative to the base residual auction clearing price, then PJM will reimburse the CSP for the difference through the DR Capacity Transition Credit.

45. We disagree with intervenors that PJM's proposal is unjust and unreasonable because it results in market distortion. In its protest, EnerNOC argues that PJM's proposed interim mechanism appears to incent unintended consequences that could be disruptive to the equilibrium of the PJM auction process due to the unwinding of previous capacity commitments. The IMM asserts that, under PJM's proposal, CSPs will be expected to make offers into these auctions on an unduly conservative basis, which could in turn shift costs to others. In addition, Constellation states that, under PJM's proposal, CSPs have no incentive to limit bids in the incremental auctions. However, as stated above, we find that PJM's proposed reliance on the incremental auctions is just and reasonable. We do not find that the parties have sufficiently supported their positions that PJM's proposal will result in significant market distortions.

46. Moreover, we disagree with the IMM that the Alternative DR Transition Credit is unnecessary and will cause market distortions in bidding behavior. The Alternative DR Transition Credit is designed to offset losses from unavoidable contractual obligations that were signed prior to April 7, 2011. To receive the Alternative DR Transition Credit, the CSP is required to provide a notification to PJM regarding viability. Only non-viable

contracts will receive the Alternative DR Transition Credit. If CSPs bid conservatively low and fail to unwind their position, as the IMM suggests, then they will be obligated to fulfill their capacity commitment during the delivery year.

47. We agree with Constellation that PJM's proposed use of the term "unviable capacity," in describing the rights of a DR provider to participate in PJM's incremental auction, for transition mitigation purposes, should be clarified. We understand from PJM's filings that PJM intends this term to mean that the CSP's previous commitment will not be viable if those commitments were made under the assumption that the CSP could count load reductions in excess of the customers' PLCs during emergency events.³⁴ We require PJM to revise its tariff to make the definition of "unviable capacity" clear.

48. In addition to PJM's reliance on the incremental auctions, PJM states that, if the CSP demonstrates that it has unavoidable contractual obligations to end-use customers, then PJM will compensate the CSP through the Alternative DR Transition Credit in an amount sufficient to make the CSP whole for the costs it incurs due to its unavoidable contractual obligations. The proposed tariff revisions state that the CSP may seek compensation through the Alternative DR Transition Credit in lieu of the DR Capacity Transition Credit if the CSP verifies that it entered into contractual arrangements before April 7, 2011 that require the CSP to pay end-use customers an amount that exceeds: (1) the base residual auction clearing price; plus (2) monetary gains (equal to the difference between payments received from committing demand resources in the base residual auction and payments made from the purchase of replacement capacity in the incremental auctions).

49. While PJM states that its proposed interim mechanism will compensate CSPs for losses associated with unavoidable contract costs, it appears that the Alternative DR Transition Credit conditions do not achieve PJM's intended goals. Although we did not intend that PJM be required to craft an approach obligating it to review individual CSP business arrangements to ensure that every impacted CSP is made completely whole, we find that the proposed Alternative DR Transition Credit, as proposed by PJM, does not adequately protect the reasonable reliance expectations of CSPs. CSPs may have significant unavoidable contractual costs that are greater than their monetary gains from buying-back capacity in the incremental auction. PJM has not explained why it is reasonable for it to condition payment for such unavoidable losses on the loss exceeding the BRA price. Accordingly, we will require PJM to either further explain why it is reasonable for it to condition payment for such unavoidable losses on the loss exceeding the BRA price or provide an alternative methodology to account for unavoidable losses resulting from contracts signed prior to April 7, 2011. Accordingly, we accept PJM's

³⁴ PJM Filing at 13-14.

filing subject to the condition that PJM submit within 15 days of this order either the explanation described above or revised tariff provisions that provide a reasonable opportunity for CSPs to recover losses associated with unavoidable contractual obligations. We find the April 7, 2011 date to be a reasonable date for determining when a CSP could be expected to rely on the prior measurement rules.

50. Comverge argues that PJM should not be in the business of reviewing a CSP's contractual relationships, which could involve difficult contract interpretation issues and require judgment regarding the parties' intent. However, PJM assures CSPs in its answer that its review of contracts for the Alternative DR Transition Credit will be confidential. We find that this review is necessary to assess whether the CSP expected to use performance above a customer's PLC. In addition, PJM's tariff does not require that a CSP submit all of its contracts under its portfolio; only those that are not viable.

B. Aggregation

1. November 2011 Order

51. The November 2011 Order accepted PJM's filing on the condition that PJM explain, in its compliance filing, how aggregation will be implemented, under a PLC-based performance measurement methodology, and how penalties will be assessed for the under-compliance of aggregated customers.³⁵ The November 2011 Order explained that PJM's proposed tariff revisions appeared to alter current customer aggregation mechanisms by changing the dynamics of individual customer load reductions. Specifically, the Commission found that, under PJM's proposal, load reductions will only be recognized as Capacity DR if the metered load is less than the PLC.

2. PJM's Compliance Proposal

52. PJM explains that the performance of aggregated customer loads will be assessed in the aggregate. PJM states that, under its tariff, the capacity compliance of aggregated loads is determined by aggregating individual customers' load reductions.³⁶ PJM further states that CSP aggregators will be able to sum all load reductions below each end-use customer's site-specific PLC to meet an aggregated load management bid. PJM adds that penalties will likewise be assessed on an aggregated basis, in other words, they will be charged to the CSP based on the net performance of its aggregated resources.

³⁵ November 2011 Order, 137 FERC ¶ 61,108 at P 69.

³⁶ PJM Compliance Filing at 5 (citing PJM OATT, Attachment K-Appendix at (iv) (Emergency Load Response Participant Aggregation)).

53. PJM states that under its newly effective rules, any reduction in consumption by a registered DR participant during emergency dispatch or verification testing that does not bring its load to less than its PLC may not be counted as capacity performance. PJM notes that, as such, the CSP's performance as an aggregated resource is assessed by netting the over-performance of some customer against the under-performance of others.³⁷

3. Protests and Comments

54. Comverge argues that PJM's compliance filing fails to show how aggregation's beneficial effects will be preserved going forward, as required by the November 2011 Order. In particular, Comverge asserts that PJM fails to describe any of the economic benefits of aggregation, or how these benefits will be preserved. Comverge notes, for example, that PJM's compliance filing omits any discussion of hedging, portfolio management, reliability, or any other benefit attributable to aggregation and how these benefits will be preserved.

55. Comverge also challenges the relevance of the example provided by PJM in its compliance filing. Comverge argues that, in this example, each of the two hypothetical customers commits less load reduction than they could potentially commit today, with one showing consumption going to zero (meaning total company closure) and the other showing consumption during the curtailment event equal to PLC. In addition, Comverge argues that this example confirms that the benefits of aggregation will be lost under PJM's revised tariff, given that the aggregated pool and each pool member will have less opportunity to over-perform, thus reducing the MWs used for risk management and hedging purposes.

4. Answers

56. PJM argues that, contrary to Comverge's assertions, PJM's compliance filing sufficiently demonstrates that aggregation will remain economically viable, under PJM's new performance standards, and will continue to benefit from diversification of load and load response capability among end-use customers. PJM adds that, while Comverge, in its protest, attempts to hold PJM to a higher standard of proof and analysis, the

³⁷ PJM provides an example of load management aggregation, under its new PLC rules, in which customer 1, an over-performing customer, provides 4 MW of reduction below its 4 MW PLC, but offered only 2 MW, and customer 2, an under-performing customer, fails to provide the 2 MW it offered. PJM notes that, under this example, no penalty is assessed where, on an aggregate (net) basis, the CSP has fully performed. PJM adds that numerous CSPs have measured the performance of their aggregated loads in this manner.

November 2011 Order did not require PJM to prove, on compliance, that there will be precisely the same extent of aggregation, in the future, under PJM's revised rules, as there was in the past.

57. Viridity asserts that Comverge's argument should be rejected as a collateral attack of the November 2011 Order, given that it questions the heart of the Commission's ruling in suggesting that CSPs are aggrieved because they can no longer claim the benefit, in an aggregated portfolio, for a customer that drops its load from a level above the PLC. Viridity adds that aggregation remains a viable option, under PJM's revised rules, given that PJM will continue to permit the aggregation of over-performing and under-performing assets.

5. Commission Determination

58. We find that PJM's explanation of how aggregation will be achieved under the PLC-based performance measurement methodology satisfies the conditions of the November 2011 Order. PJM's explanation demonstrates how aggregation is implemented and how penalties are assessed under the PLC-based performance measurement methodology. As PJM noted, under its proposed rules, "aggregators will be able to sum all load reductions below each end-use customer's site-specific PLC to meet an aggregated Load Management bid."³⁸ According to PJM's explanation, a Capacity DR portfolio's performance is determined by netting the over-performance and under-performance of resources within that portfolio. As noted above, the performance of a CSP is based on the entire portfolio of sites and in instances where the under-performance of some sites is offset by the over-performance of other sites (in the same zone), no penalty will be assessed. PJM's illustration also demonstrates the beneficial effects of aggregation, that is, diverse resources can complement one another's performance with load drops below the PLC, such that the aggregate resource performance will be counted toward the capacity compliance obligations of the CSP.

59. We reject Comverge's argument that PJM fails to address the "beneficial effects" of aggregation. The November 2011 Order accepted PJM's filing on the condition that it explain how aggregation will be implemented, how penalties will be assessed for the under-compliance of aggregated customers, and how such beneficial effects of aggregation will be achieved going forward under its proposal. As noted above, PJM's proposal would allow load reductions and penalties to be assessed in the aggregate, according to performance measured by load drops below a customer's PLC.

³⁸ PJM Transmittal Letter at 5.

C. Comparison Load Baselines

1. November 2011 Order

60. The November 2011 Order accepted PJM's filing on the condition that PJM clarify its description of the comparison load baseline metric.³⁹ The Commission noted that, under PJM's revised tariff, GLD customer compliance will be based on the lesser of: (i) a comparison load used to best represent what the load would have been had PJM not declared a Load Management event,⁴⁰ or had the CSP not initiated a test as outlined in the PJM Manuals, minus the metered load; or (ii) the current delivery year PLC minus the metered load.⁴¹

61. The Commission stated, however, that in the case of a comparison load assessment, PJM had failed to define how it, or a CSP, would qualify the "best" representation of what load would have been, had the resource not been instructed to reduce consumption. The Commission therefore conditioned its acceptance on PJM clarifying, in its tariff, the options available for estimating comparison loads and provide a reference to the manual in which these options are described.

2. PJM's Compliance Proposal

62. PJM proposes to add new tariff language, in the reporting and compliance section of its Attachment K-Appendix, identifying and describing the permissible methodologies for determining comparison loads along with a statement that more detailed descriptions of these methodologies can be found in PJM's Manual M-19, Attachment A.

3. Protests and Comments

63. Comverge, ECS and EnerNOC challenge PJM's compliance proposal. Comverge argues that PJM's proposal is not limited to the changes necessary to satisfy the requirements of the November 2011 Order. In particular, Comverge asserts that, in requiring PJM to provide a list of the options available for estimating comparison loads,

³⁹ November 2011 Order, 137 FREC ¶ 61,108 at P 79.

⁴⁰ Capacity DR resources are required to reduce load, in the applicable delivery year, if requested to do so by PJM, following the declaration of a Maximum Emergency Generation action, unless the resource has already reduced its load pursuant to its participation in PJM's economic load response program. PJM OATT, Attachment DD at Attachment K-Appendix, PJM Emergency Load Response Program.

⁴¹ See, e.g., PJM OATT, Attachment DD-1 at section L.

the November 2011 Order did not require PJM to describe each of the options. Comverge argues that PJM's proposed description of the "Comparable Day" option differs from the option's description in Manual 19.⁴² EnerNOC argues that because PJM's revised definition was not required by the November 2011 order, it must be rejected.⁴³

64. EnerNOC argues that PJM's proposed change is not trivial and is still being considered by PJM stakeholders. Comverge notes that PJM's proposed change would revise a methodology commonly used today to calculate customer baselines, which is a methodology that relies on average load during peak days. ECS agrees that PJM's proposed language does not reflect the methodology that CSPs utilized for event compliance during the summer of 2011.

65. Finally, Comverge argues that PJM's compliance proposal re-defines the terms "Same Day," "Customer Baseline," and "Regression Analysis." For the same reason outlined above, Comverge urges the Commission to reject each of these proposed changes, as beyond the scope of this compliance proceeding.

4. Answers

66. PJM argues that its proposed tariff revision addressing the term, Comparable Day, is appropriate and should be accepted. PJM asserts that its proposed tariff language, while inconsistent with the existing manual provisions, was submitted under the clarification that the manual was in the process of being revised. PJM states that its proposed tariff language tracks the changes expected to be approved at an upcoming stakeholder meeting. PJM asserts that even if the Commission agreed with the CSPs' arguments and rejected the proposed "comparable day" description, PJM still would

⁴² See Manual 19, Attachment A, defining Comparable Day as "[t]he customer's actual hourly loads on a non-interruption day judged to be similar in other respects to the interruption day [and providing that] [t]hese loads may be adjusted for differences in weather conditions or, an average of the customer's actual hourly loads on peak days." Comverge notes that this definition would be revised, under PJM's proposal, to provide as follows: "[a] single weekday that is comparable to the event or test day and accurately represents what the customer's load would have been absent the event or test." See proposed PJM OATT, Attachment K-Appendix (Emergency Load Response Program, Reporting and Compliance).

⁴³ See EnerNOC Protest at 32 (citing 18 C.F.R. § 154.203(b) (2011) ("Filings made to comply with Commission orders must include only those changes required to comply with the order[;] [a] compliance filing that includes other changes or that does not comply with the applicable order in every respect may be rejected.")).

make the already-planned changes to the comparable day terms of its manual. Therefore, according to PJM, the protests on this point are immaterial, and should be denied.

5. Commission Determination

67. We accept PJM's proposed tariff revisions addressing the comparison load baseline clarifications required by the November 2011 Order, subject to conditions. The November 2011 Order accepted PJM's filing on the condition that PJM include a list of the options available for estimating comparison loads and a reference to the manual in which those options are described. In its compliance filing, PJM not only provides a list of the available options and the manual reference, but also a description of each option. The description of those options goes beyond the Commission's directive in the November 2011 Order and therefore, we will accept this filing but on the condition that PJM remove the proposed language from its tariff and include only a list of options available for estimating comparison loads and the appropriate manual reference to those options.

68. While we are requiring PJM to remove its proposed descriptions of the various measurement methodologies, we also recognize that PJM is currently undergoing a stakeholder process that is separate from this proceeding. In its answer, PJM states that its proposed descriptions are expected to be endorsed for insertion in the PJM manuals at an upcoming stakeholder meeting and that the manual provisions are not contingent upon the Commission's approval of PJM's proposal in this proceeding.⁴⁴

D. Additional Issues

69. Viridity argues that the Commission, in the November 2011 Order, established a compliance obligation "recommend[ing] that PJM analyze and discuss with stakeholders whether a more accurate compliance metric or adjustment to the PLC can be established for estimating a resource's contribution to the reliability requirement and the amount of capacity which a customer is obligated to purchase[.]"⁴⁵ Viridity states that PJM's filing does not address these issues and there is no schedule established for addressing them. Viridity requests that the Commission direct PJM to remedy this situation prior to the beginning of the 2012-13 delivery year.

⁴⁴ PJM Answer at 26. For information on the stakeholder proceeding, see <http://pjm.com/~media/committees-groups/committees/mrc/20120223/20120223-action-item-02c-draft-manual-19-revisions-presentation.ashx>.

⁴⁵ Viridity Protest at 1 (citing November 2011 Order, 137 FERC ¶ 61,108 at P 84).

70. The Commission, in the November 2011 Order, did not require PJM to address this issue in its compliance filing and therefore we reject Viridity's protest. As provided by the Commission in the November 2011 Order, PJM is required to submit a report on this issue in an informational filing, which is to be made by PJM within one year of the November 2011 Order.⁴⁶

The Commission orders:

PJM's proposed tariff revisions are hereby conditionally accepted, effective November 7, 2011, subject to conditions and to the submission of a compliance filing regarding these conditions within 15 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁶ November 2011 Order, 137 FERC ¶ 61,108 at P 88.